89-786

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO, O.L. MCCOTTER, SECRETARY OF CORRECTIONS, and ROBERT J. TANSY, WARDEN OF THE PENITENTIARY OF NEW MEXICO,

Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS, and ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a federal court, on motion of state officials who are subject to a prison consent decree agreed to by predecessor officials, may refuse to vacate those portions of the decree that, as legal developments since entry of the decree made clear, go far beyond any federal-law requirements.

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The Governor of New Mexico, the Secretary of Corrections of the State of New Mexico, and the Warden of the Penitentiary of New Mexico petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 885 F.2d 1485. The opinion of the district court (Pet. App. 16a-45a) is reported at 678 F. Supp. 839.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves a federal court consent decree that governs each of New Mexico's four prisons, including three that were not opened until after the decree was entered in 1980. The decree addresses in detail "the minimal civilized measure of life's necessities"—food, clothing, shelter, medical care, sanitation, and safety—that the Eighth Amendment guarantees to prisoners. *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). The decree goes on, however, to specify policies and practices that the State's prison officials must follow in other areas, including the internal prison classification of inmates, the use of maximum security cells, the use of disciplinary measures such as segregation, the provision of training or education to inmates, and the practice of double celling. Petitioners challenge the district court's refusal, upheld by the court of appeals, to vacate those portions of the decree that are not legitimate remedies for the violation of federal rights.

1. *The Complaint.* In 1977, respondents, who were prisoners in New Mexico's only prison, the Penitentiary of New Mexico (PNM), filed this class action against petitioners' predecessors in office and two deputy wardens at PNM. The complaint, as amended, challenged a wide range of conditions and practices at PNM. Pet. App. 196a-206a. Based on a single set of factual allegations, the complaint asserted violations of the federal Constitution, the New Mexico Constitution, New Mexico statutes, and 42 U.S.C. § 3750(b). Pet. App. 203a-205a.

In particular, challenging both the "totality of conditions and certain specific conditions" at PNM (Pet. App. 197a), respondents alleged that the prison was overcrowded, unsanitary, inadequately lighted, badly ventilated, and poorly heated and cooled; that its food and medical services were deficient; that prisoner safety was inadequately protected, citing understaffing and poor training of prison staff; that access to law books and resources was inadequate; and that correspondence and

visitation practices were too restrictive, irrational, and discriminatorily applied. In addition, respondents charged that PNM was in violation of New Mexico law, in that prisoners were not classified according to rehabilitation needs, but instead were generally assigned quarters based on space availability, resulting in classifications that exceeded security requirements. With respect to inmate activity, the complaint alleged that "[i]dleness is the hallmark of the PNM" (*id.* at 202a) and that there were inadequate work, training, education, and recreational opportunities for PNM's inmates. And with respect to inmate discipline, the complaint stated that due process was not observed and that the conditions of segregation cells were grossly deficient. *Id.* at 199a-203a.

2. *The Consent Decree.* a. In 1979, after the district court had certified a plaintiff class consisting of all present and future inmates at PNM, the parties agreed to, and the court entered, detailed consent decrees settling certain of respondent's claims. The decrees laid down rules governing inmate correspondence (Pet. App. 57a-65a), attorney-prisoner consultation (*id.* at 66a-74a), food services (*id.* at 75a-79a), inmate access to legal materials (*id.* at 80a-101a), and visitation (*id.* at 102a-131a). In early February 1980, PNM experienced a major riot resulting in numerous deaths, injuries, and property damage. *Id.* at 4a. Several months after the riot, the parties reached a settlement of the remaining claims in the litigation and proposed a comprehensive consent decree that incorporated the previously entered orders. *Id.* at 48a-195a. The district court—after expanding the plaintiff class to include all present and future inmates, not just of PNM, but of *any* maximum or medium security prison in New Mexico—approved the consent decree and ordered final judgment entered on July 14, 1980. *Id.* at 48a-51a.

b. The decree is "elaborate, extending well over 100 printed pages, and by its provisions regulate[s] many aspects of the prison operation." Pet. App. 4a. Both the parties in their agreement and the district court in

its order entering the decree acknowledged that the decree "may include specific requirements and procedures beyond what is required by the Constitution of the United States . . . or any other constitutional, statutory or common law requirement." *Id.* at 49a, 53a. Nevertheless, most of the decree is not challenged here. Specifically, petitioners have not moved to vacate provisions that, as the court below stated, "comprehensively regulate[] [petitioners'] conduct in the penitentiary in the area of (1) food services, (2) physical facilities, including clothing and personal hygiene items provided to inmates, (3) medical care, (4) mental health care, (5) correspondence between inmates and outsiders, (6) access to legal resources, and (7) attorney-client visitations." *Id.* at 4a.

The food services provisions of the decree, for example, provide for participation by an outside dietician, provision of meals meeting various religious requirements, specified temperature levels for hot and cold food, specified temperatures for dishwashing (and a daily log of such temperatures), and various hygenic controls. Pet. App. 75a-79a. Provisions dealing with living conditions limit the amount of time a prisoner may be kept in a cell each day and set standards governing, among other things, toilet and shower facilities, furniture (*e.g.*, bunk, desk, chair or stool, storage space), lighting, acoustics, ventilation, clothing, mattresses and linens, personal hygiene items, cleaning procedures and inspections, and fire and safety plans. *Id.* at 136a-141a. The decree also establishes detailed standards for the provision of medical and mental health care. *Id.* at 146a-161a. In addition to the sections governing correspondence (*id.* at 57a-65a), attorney visitation (*id.* at 66a-74a), and access to and the content of prison law libraries (*id.* at 80a-101a (*e.g.*, requiring typewriters, specified books, copiers)), the decree further requires "[a]dequate staff and staff training . . . to reasonably assure the safety and protection of inmates." *Id.* at 162a. It requires, among other things, that "[a]t least one correctional officer will be stationed in each

cellblock so that all inmates will have voice contact with a correctional officer at all times," that staff training be provided in accordance with specified professional standards, and that prison officials take action (as they have done) to implement the recommendations of a commissioned study of personnel needs. *Id.* at 162a-163a.

c. The foregoing provisions guarantee the prisoners' Eighth Amendment rights to the "essential human needs" of food, clothing, shelter, medical care, sanitation, and safety (*Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir.), *reh'g denied*, 850 F.2d 796 (1988); *see Rhodes v. Chapman*, 452 U.S. at 348), as well as their interests (claimed under, *e.g.*, the First, Sixth, and Fourteenth Amendments) in correspondence, attorney consultation, and access to legal resources. Supplementing those provisions, however, the decree also contains extensive requirements in several other areas. It is these requirements that petitioners challenge. *See* Pet. App. 5a-6a (listing challenged provisions).

• *Classification* (Pet. App. 132a-135a). Security classification policies must be "guided by rational, objective standards derived from behavioral criteria" (*id.* at 132a) and must provide for the least restrictive classification and conditions compelled by security requirements (*id.* at 132a-133a). A classification may not be based solely on "arbitrary and rigid criteria such as detainers, consecutive sentences, etc.," but must be based on "an evaluation of the accumulation of identified, relevant and rational factors and standards." *Id.* at 132a. A disciplinary infraction may not result in a classification change; any such change must be based on the inmate's entire record. *Ibid.* Classification decisions must be made by a three-person committee representing the psychological staff, the program staff, and the correctional security staff, with participation by the inmate. *Id.* at 133a-134a.[1]

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[1] In addition, "[j]obs, program assignments, housing and services will be distributed in a rational, fair and equitable man-

• *Maximum Security* (Pet. App. 164a-172a). Except for prisoners who request such classification, maximum security may be used only where the inmate involved has himself committed, or is threatened by, particular acts disruptive of prison security,[2] thus making maximum security unavailable for known gang leaders who have not themselves engaged in recent misconduct. A transfer to maximum security must be based on notice and a hearing (*id.* at 166a), and alternatives must be explored and their rejection explained (*ibid.*). Although a provision of the decree that is not challenged here provides for review of maximum security status every seven days for the first two months and every 30 days thereafter,[3] the decree provides for additional formal reviews and specifies rules governing the conduct of reviews and standards for continuation of maximum security status. *Id.* at 167a-168a. The decree also provides that maximum security status generally may not extend beyond a specified number of days (*id.* at 165a, 166a-168a) and that inmates in maximum security must receive five hours daily,

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ner"; each inmate must be provided educational, vocational, medical, and psychological programs consistent with the decree; appropriate programs must be provided for "inmates who are drug addicts, drug abusers, alcoholics, emotionally disturbed, mentally retarded, or who pose high risks or require special protection"; and during intake and classification, inmates must be provided services (*e.g.*, correspondence, visitation, recreation) comparable to those available to the general population. Pet. App. 133a.

[2] Pet. App. 164a-165a: ¶ 3(a) (requiring finding of recent act of violence, destruction of property, escape, riot, or hostage taking, plus substantial threat of same or to others' safety); ¶ 3(b) (requiring findings, "based on overt acts, that an inmate presents an imminent threat of serious bodily harm to others or an imminent threat of escape"); ¶ 3(c) (requiring finding that inmate is a victim of a violent act, and a clear danger of recurrence); ¶ 3(d) (requiring finding that inmate's safety is jeopardized by "immediate life threatening conflict"); ¶ 3(e) (5-day reclassification may be based on "continuous, substantial and documented violation of institutional rules").

[3] Pet. App. 167a: Maximum Security Section, ¶ 7 (first sentence).

five days a week, of "meaningful programmed activities" and two hours per week of visitation. *Id.* at 168a-169a (Maximum Security Section, ¶ 10 (all but second sentence), ¶ 11(f)).[4]

• *Inmate Discipline* (Pet. App. 173a-195a). Inmates may be punished only for certain designated offenses and only for specified lengths of time, never exceeding 30 days. *Id.* at 173a-182a.[5] The decree contains elaborate requirements concerning the preparation of reports on inmate misconduct, 24-hour notice to the inmate, submission for supervisory review, further referral to a disciplinary officer, and hearings within specified times before a specified official or committee. *Id.* at 182a-186a. Although a provision of the decree not challenged in this case provides for all of the procedural protections mandated by *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1974),[6] the

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[4] Those provisions are in addition to numerous guarantees that are not challenged here—concerning clothing, linens, meals, correspondence, showers, grooming, access to legal resources, retention of personal property, medical and mental health care, religious rights, and staff training, as well as a guarantee of one hour of recreation daily. Pet. App. 169a-172a: Maximum Security Section, ¶ 10 (second sentence), ¶¶ 12-21.

[5] The decree allows, for example, no longer than 30 days in "disciplinary segregation" even for rioting, taking hostages, "unjustified killing," and escape. Pet. App. 176a. Such disciplinary action does not preclude reclassification (*id.* at 175a), but it is not itself a basis for maximum security classification. *See* p. 5 & note 2, *supra*.

[6] Paragraph 12 of the Inmate Discipline section of the decree, which is not challenged, provides that a written record or summary of the proceedings must be kept; a tape recording of the hearing must be made; the inmate must be advised of his rights; references to confidential sources that include identifying facts must be excluded; the findings must document the specific evidence relied on and the reasons for the action taken, unless doing so would jeopardize institutional security; the inmate must have advance written notice of the charges and must be present throughout the hearing, unless his presence would jeopardize safety or he is disruptive or he has escaped; the inmate may be represented by another inmate or a staff member, make his own statement, call witnesses, and present evidence; and although reliable information from a confidential

decree goes on to lay down additional procedural rules, specifying available dispositions of charges and providing for review by the prison superintendent and by the Secretary of Corrections and Criminal Rehabilitation, with the possibility that the latter's review will be de novo. Pet. App. 190a-195a.

• *Inmate Activity* (Pet. App. 142a-145a). All prisoners except those in maximum security or disciplinary segregation are guaranteed "8 hours a day of meaningful activity." Pet. App. 145a. Petitioners must develop for each inmate, through appropriate testing and counseling, a "comprehensive program" that includes vocational training, education, and work. *Id.* at 142a. The programs must be linked to community resources where possible, and the prison's educational program must be comparable to that of the New Mexico public school system. *Ibid.* Full-time employment must generally be available to inmates. *Id.* at 144a.[7] The prison must provide special pre-release programs. *Ibid.* All of those programs are to be provided pursuant to a comprehensive plan, including timetables, that petitioners were required to (and did) develop. *Id.* at 145a. Notwithstanding the requirement that vocational, educational, and work programs be developed and made available, "[i]nmates may refuse to participate in institutional programs except work assignments." *Id.* at 145a. *See also id.* at 134a (same exemption for maximum security inmates).

• *Double Celling and Space Requirements at New Facilities* (Pet. App. 136a-138a). Suppleemnting the requirements designed to ensure adequate conditions of living quarters, the decree prohibits housing more than one prisoner in any cell (except temporarily in dire emergencies caused by a "riot, fire, or other disaster"), regardless of

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source may be used, it must be summarized for the inmate and may not be the sole basis for an adverse finding. Pet. App. 187a-190a.

[7] Petitioners have not challenged the requirement that inmates be provided with at least one hour per day of recreational programs supervised by a full-time, qualified recreation director. Pet. App. 144a.

the size of the cell. *Id.* at 136a (Living Conditions Section, ¶ 1). Double-bunking is likewise forbidden. *Id.* at 137a (¶ 4(M)). Every dormitory must contain 60 square feet of living area per inmate. *Ibid.* (¶ 4(A)). And every cell, except for those at the original PNM facility (PNM-Main) that were in use in 1980, must be at least 60 square feet in area.[8] These single-celling, single-bunking, and space requirements apply not only to PNM-Main and facilities operated for disciplinary segregation, maximum security, or specialized mental-health care—as to which they are not challenged—but also to the prison facilities constructed since July 1980, as to which they are challenged.[9]

• *Visitation* (Pet. App. 104a-131a). The number of visitors an inmate may receive and the length of visits may be limited only for reasons of prison scheduling, space, and personnel. *Id.* at 104a. *See id.* at 108a-110a (setting forth time and space constraints), 110a (size of visitor list). No visitor an inmate wishes to see may be excluded unless there is "clear and convincing evidence" of jeopardy to safety and security. *Id.* at 105a. Visitors may not be excluded because they are ex-offenders or have visited or are visiting other inmates. *Id.* at 105a.[10] Prison officials may undertake only certain limited investigations concerning visitors and may maintain only certain limited files on visitors. *Id.* at 107a. "Contact"

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[8] As to the cells at PNM-Main, the decree provides that no prisoner may be housed in such a cell for more than 10 hours per day, except for prisoners in disciplinary segregation or maximum security status. Pet. App. 136a (¶ 2).

The decree also requires that the Secretary of Corrections maintain accurate data on the maximum number of prisoners that can be housed at PNM (under the single-celling and dormitory-space requirements) and forbids petitioners to exceed that number. Pet. App. 138a (¶ 11).

[9] Also at issue is a provision of the Living Conditions Section (¶ 8) that requires each inmate to be provided adequate amounts of cigarettes or tobacco. Pet. App. 138a.

[10] Special rules apply to inter-prison visits, which are permitted for members of the immediate family. Pet. App. 113a-115a.

visits, including kissing and embracing, must be allowed. *Id.* at 112a. With respect to searches of visitors, in addition to requiring reasonable cause (a provision not challenged here), the decree prohibits any strip search unless the "Chief Executive Officer of PNM determines that there is probable cause to believe that the particular visitor possesses contraband." *Ibid.* And with respect to searches of prisoners, although "strip shakedowns" are permitted, a visual body-cavity inspection requires reasonable suspicion that the prisoner possesses contraband (which is not created by the mere fact of a contact visit), and a manual or instrument inspection (by medical personnel) requires probable cause. *Id.* at 112a-113a.

3. *The Present Motion.* In June 1987—after years of disputes over implementation of the decree, which did not abate with the appointment in 1983 of a special master to oversee the prisons [11]—petitioners filed the present motion, asking the district court to modify the decree by vacating the portions, described above, concerning classificaiton, maximum security, inmate disciplies, inmate activity, and double celling and space requirements.[12] *See* Pet. App. 5a-6a. Petitioners argued that continued enforcement of those provisions (which, of course, supplement unchallenged provisions addressing all Eighth Amendment concerns) could not be justified in *federal* law, because they went far beyond the proper vindication of any federal rights, as clarified by legal developments since entry of the decree. And the provisions' continued enforcement could not be justified by *state* law, petition-

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[11] The master has conducted comprehensive on-site investigations and issued more than 20 detailed compliance reports, totalling more than 2,000 pages and prompting equally extensive responsive filings by the parties. *See* Pet. App. 20a.

[12] Petitioners' motion also challenged a decree provision addressing decree modification. Pet. App. 54a-55a (Agreement, ¶ 6 (all but first sentence)). That provision, in addition to setting forth procedures for proposing changes in the consent decree, states that "[n]o change or changes may be made which will lessen the benefits provided by the [decree]."

ers noted, because the federal court had no jurisdiction to enforce state law against state officials, the State never having waived its sovereign immunity embodied in the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).[13]

The district court denied the motion in its entirety, relying in part on this Court's decision in *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986). Pet. App. 16a, 33a-34a, 41a. The court also concluded that *Pennhurst* did not bar enforcement of the contested provisions because the complaint "alleged violations of federal law" and "every substantive section of the consent decree is tied to factual allegations in the [complaint]" (*id.* at 39a). The court did not, however, consider whether the sections of the complaint corresponding to the challenged decree provisions actually stated violations of federal law (especially as that law has been clarified since 1980) or whether the decree provisions could be legitimate remedies for any such violations.[14]

4. *The Court of Appeals Decision.* The court of appeals affirmed. Pet. App. 1a-15a. It concluded first that the challenged provisions should not be vacated—and do not

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[13] Executive officials cannot on their own waive a State's sovereign immunity embodied in the Eleventh Amendment. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Any legislative waiver must be "in unmistakable language in the statute itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). There was no such waiver here. Indeed, the New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-1 *et seq.*, which comprehensively addresses when and where the State may be sued, expressly reserves the State's full sovereign immunity embodied in the Eleventh Amendment. Neither the court of appeals nor the district court held to the contrary. *See* Pet. App. 33a n.15.

[14] Having rejected petitioners' argument that modification was required as a matter of law—not only because *Pennhurst* rendered the extra-federal parts of the decree outside the court's jurisdiction, but also because principles of federalism and comity and changes of law required equitable modification, *see, e.g.*, Memorandum In Support of June 1987 Motion at 1 & n.1, 3-10, 12 n.8, 65—the district court declined to consider equitable modification of the decree without first conducting an extensive factual hearing. Pet. App. 44a & n.27.

implicate the State's sovereign immunity under *Pennhurst* —because the provisions "[a]rguably . . . relate to, or tend to vindicate, federally protected rights." *Id.* at 11a. Failing to mention that the decree applies not only to PNM-Main but also to three facilities that were not even opened until after the decree was entered, the court held that "each of the matters which form the basis of this case is a part of" the "totality of conditions" that respondents alleged (with respect to PNM) were unconstitutional under *Hutto v. Finney*, 437 U.S. 678, 685-89 (1978). Pet. App. 12a-13a. The court also suggested in a single footnote (*id.* at 13a n.10) that, even viewed in isolation, each of the challenged provisions vindicates a federal right, although it cited only four decisions, *Pell v. Procunier*, 417 U.S. 817 (1974); *Rhodes v. Chapman*, *supra*; *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), none of which found measures anything like those at issue here to be constitutionally required.[15]

The court of appeals also held, in the alternative, that the challenged decree provisions may continue to be enforced because "even if they didn't bear directly on federal rights, the provisions sought to be vacated come within the rule of *Local No. 93 v. City of Cleveland*, *supra*." Pet. App. 14a. It was sufficient, in the court's view, that the decree (1) "springs from and serves to resolve a dispute within the district court's subject matter jurisdiction," (2) "comes within the 'general scope' of the case made by [respondents] in the [complaint]," and (3) "furthers the objectives upon which the complaint is based." *Id.* at 14a-15a. If those three conditions were satisfied, the court ruled, the decree need not be modified

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[15] *See* note 35, *infra*. With regard to the challenged provision that purports to forbid changes in the decree that lessen benefits to respondents (*see* Pet. App. 5a n.6), the court of appeals concluded that the provision should not be vacated because it "concern[s] procedure, rather than substance." *Id.* at 12a.

even if it provides "broader relief than the court might possibly have been empowered to enter after trial." *Id.* at 15a. In support, the court quoted only a portion (italicized below) of this Court's statement in *Local No. 93* that, "in addition to the law which forms the basis of the claim, *the parties' consent animates the legal force of a consent decree*" (478 U.S. at 521). Pet. App. 15a.[16]

REASONS FOR GRANTING THE WRIT

The issues in this case vitally affect the ability of States to administer their most basic programs, particularly their prisons, free from long-term, day-to-day federal court control over matters not governed by federal law. In requiring that state institutions be operated according to an outmoded consent decree, the court of appeals ignored fundamental principles limiting federal court power over States, disregarded well-established requirements governing the modification of consent decrees, adopted a gross misreading of *Local No. 93*, and, finally, conducted a patently inadequate examination of the federal law basis for the challenged provisions. Not only does the court's approach virtually abandon any meaningful legal limits on the role of consent decrees in ordering state-federal relations, it leaves state institutions, subject only to the district court's essentially unconstrained discretion, under close federal court supervision indefinitely and without justification in federal law.[17]

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[16] Evidently concluding that its analysis was dispositive, the court did not separately discuss petitioner's argument (C.A. Br. 36-43)—based on, *e.g.*, *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), and *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961)—that modification of the decree was required on grounds of post-decree changes in the law—particularly, the *Pennhurst* decision and this Court's clarification of constitutional standards governing prisoners' rights in *Rhodes v. Chapman*, *supra*, and other cases.

[17] While modification of consent decrees generally lies within a district court's equitable discretion, that discretion is " 'guided by sound legal principles.' " *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *United States v. Burr*, 25 F. Cas.

The proper standards for modification of consent decrees affect decrees governing the operation of prisons and other institutions in numerous States.[18] The federal courts of appeals have adopted directly conflicting readings of *Local No. 93* and have taken inconsistent approaches to the general problem of modifying consent decrees binding States. Review by this Court is therefore warranted.

I. The Court Of Appeals Erroneously Held, Based On A Misconstruction Of *Local No. 93*, That A Federal Court May Continue To Enforce Against Objecting State Officials Provisions In A Consent Decree That Are Not Proper Remedies For Any Federal Law Violation.

In one of its alternative holdings, the court of appeals concluded, based on *Local No. 93*, that satisfaction of a three-part test requiring only a loose association between a consent decree and federal law was sufficient to justify

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No. 14,492d, pp. 30, 35 (C.C. Va. 1807) (Marshall, C.J.)). It is precisely such principles that the lower courts abandoned in this case.

[18] According to the ACLU National Prison Project, almost half the States currently operate some or all of their prisons under consent decrees. ACLU National Prison Project, *Status Report: The Courts and Prisons* (Apr. 17, 1989) (listing 22 such States). The issues presented here directly affect not only those decrees but additional decrees governing state mental-illness and -retardation programs. *See, e.g., Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir.), *reh'g denied*, 815 F.2d 1034 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). Moreover, because some of the issues bear closely on the standards for modifying remedial decrees that were initially contested, the present case in fact affects numerous additional States. ACLU National Prison Project, *supra* (38 States operate some or all of their prisons under judicial order).

Analogous issues concerning the enforcement of consent decrees against the federal government also have arisen with great frequency in recent years. *See* Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987) (discussing cases).

continued enforcement of contested provisions against state officials. That standard, which disclaims the obligation to inquire into the federal-law basis for each enforced provision, is incorrect. And *Local No. 93* does not support it.

A. The court of appeals' lax standard violates fundamental principles governing the relations between federal courts and state governments. It is, of course, desirable and, indeed, imperative that a federal court enforce federal-law obligations against state officials. *See Ex Parte Young*, 209 U.S. 123 (1908). But by the same token, bedrock constitutional principles, such as those embodied in the Eleventh Amendment, separation of powers, and federalism, require that a federal court *not* enforce decree provisions against state officials in circumstances like the present unless each of those provisions is adequately justified as enforcing a federal-law obligation.

Thus, federal court equitable decrees against state officials must not violate a State's Eleventh Amendment sovereign immunity by including measures that cannot be justified under federal law. *See Pennhurst State School & Hosp. v. Halderman*, *supra*. Federal courts, for separation of powers reasons, must respect both their own limited ability to undertake tasks such as running a prison and, complementarily, the commitment of such tasks to the political branches of government. *See Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987). Similarly, in prison cases as in other cases, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). This Court has often stressed those basic limits on federal judicial power, which are especially important where, as in the prison setting here, day-to-day flexibility and discretion are critical to administration.[19] Yet the court of appeals ignored those

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[19] *See, e.g., Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); *Turner v. Safley*, 107 S. Ct. at 2262; *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (" 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' ")

principles when, in adopting its *Local No. 93*-based standard, it declared that there was no need for a careful examination of the federal-law basis for each decree provision to be enforced against objecting state officials.[20]

The court of appeals' lax approach cannot be justified on the ground that the decree was originally entered by consent. On the contrary, the court violated long-established principles of consent decree law in ruling otherwise. Thus, even in a private-party case, this Court has recognized that a *present* basis in federal law is required in order to warrant continued enforcement of a contested consent decree provision. In *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961), a decision the court of appeals simply ignored, the Court held that vacating a now-contested consent decree was required as a matter of law where the governing legal standards at the time of the motion permitted what the consent decree prohibited.[21] The court explained

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(quoting *Rhodes v. Chapman*, 452 U.S. at 349 n.14); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) ("scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts") (internal quotation marks and citations omitted); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (federal court remedy must respect states' interests "in managing their own affairs"); *Rizzo v. Goode*, 423 U.S. at 378 ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'") (citation omitted); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

[20] As noted below (Section II, *infra*), when the court of appeals did discuss the federal-law basis for the contested decree provisions, that discussion was grossly inadequate.

[21] The Court held that the district court had abused its discretion in denying the defendant union's motion to modify a consent decree that barred it from discrimination against non-union employees. The Court concluded that, whether the decree was entered by consent or after trial, it may not continue to be enforced once Congress had changed the law to permit a union shop in certain circumstances, even though there was substantial evidence of con-

that "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (*id.* at 652) and that the parties' promises did not warrant continued enforcement of the decree because "the court was not acting to enforce a promise but to enforce a statute" (*id.* at 653).[22] The court of appeals' adoption of its *Local No. 93*-based standard disregards the *System Federation* ruling by denying that there is any need for careful inquiry into the present federal-law basis for an order directed at decree parties.

Important policies underlie the requirement that judicial enforcement of a consent decree, much like any other federal court injunction, be properly justified as a remedy under present federal law, and not rest only on the contractual aspect of the decree. "[A]n injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained the equitable relief"—which is so whether the decree was entered after trial or with the parties' consent. 364 U.S. at 647. *See also id.* at 651 ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."). Moreover, unlike an injunction entered over the defendant's objection, a consent decree rarely receives much judicial scrutiny on entry, as the parties and the court typically are eager to avoid protracted litigation. Thus, a modification motion may be the first occasion for careful examination of the court's authority. Further, the consent at the time of the decree is itself presumptively based on the law pre-

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tinued union hostility (indeed, violence) against non-union members. 364 U.S. at 648-53.

[22] Similarly, in *Pasadena City Bd. of Educ. v. Spangler*, *supra*, this Court reversed a district court's denial of a motion to modify a school desegregation decree that had been entered, after a liability holding, with the parties' consent. Relying on *System Federation*, the Court ordered modification in critical part because the decree imposed requirements that went beyond those subsequently approved by the Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *See* 427 U.S. at 433-34, 437-38.

vailing at that time, and that law may dramatically change. *See System Federation*, 364 U.S. at 652. Finally, the benefits of settlement—both to the parties and to the courts—quickly diminish once there is no longer agreement among the parties.[23]

Where, as in this case, it is a State that is bound by a decree, there are additional reasons, both practical and doctrinal, that consent cannot serve as a justification for the continued enforcement of contested provisions of consent decrees against state officials. As a practical matter, the state officeholders at the time of the decree's entry may have given their consent for reasons unrelated to the merits of the case—*e.g.*, to avoid exposure of wrongdoing or incompetence at trial; to gain a mandatory federal-court basis for the allocation of limited state resources to those officials' own programs; or to lock in their own policy choices in a manner that their successors in office, who may have different views, cannot alter.[24] And at

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[23] Consent decrees like the present frequently erupt in disputes (as this one did immediately upon issuance) because they often do little more than establish broad, open-ended standards that generate continuing disagreements about implementation. *See United States v. Michigan*, 680 F. Supp. 928 (W.D. Mich. 1987) (reprinting 37 different enforcement orders in a consent decree case). *See also New York State Ass'n for Retarded Children, Inc. v. Carey*, *supra*; *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982). The systemic benefits of consent decrees are accordingly far less than they might seem. At the same time, the systemic costs to the courts of continuing enforcement of decrees not justified by applicable law may be considerable. *See Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341 (7th Cir. 1987) ("[e]very hour consumed administering a consent decree is an hour taken from other litigants, who must wait in a longer queue"); *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1544 (3d Cir. 1984) (Becker, J., concurring) (stressing need for "a principled basis for limiting the range of disputes into which the federal courts can be dragged by means of an overly broad consent decree").

[24] *See Kasper v. Board of Election Comm'rs*, 814 F.2d at 340 ("district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature"); Easterbrook, *Justice and Contract in Consent Judgments*, 1987 Univ. of Chicago

the level of constitutional doctrine, this Court's case law under the Contract Clause—the provision of the Constitution that is specifically concerned with federal insistence on States' compliance with their contracts—has long declined to give federal-law protection to contracts in which state officeholders seek to bind the State to a particular exercise of traditional governmental powers.[25] There is no sound reason for the federal courts to give any greater federal-law force to the contractual aspect of a consent decree that constrains the exercise of state governmental powers, such as those concerning prison administration.[26]

For those reasons, a consent decree binding state officials should not be enforced over their objection to the extent it goes beyond the relief that would be available under federal law after a trial. At a minimum, however,

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Legal Forum 19, 33 ("The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in this strategy."); Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1806 (1988) (citing sources).

[25] The Court stated in *Stone v. Mississippi*, 101 U.S. 814, 820 (1879):

> [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'

See also United States Trust Co. v. New Jersey, 431 U.S. 1, 23-24 (1977); *El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-38 (1934); Rabkin & Devins, *supra*.

[26] Under *Pennhurst*, of course, whether the consent decree has force as an agreement under state law is not an issue for the federal court.

a federal court considering state officials' motion to modify a consent decree must examine each contested provision to determine that it is properly tied to the protection of federal rights. Any lesser standard would lead to continued enforcement of decree provisions that are incompatible with the constitutional limits on federal judicial authority and, in a case like this, to " 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.' " *Turner v. Safley*, 107 S. Ct. at 2262 (quoting *Procunier v. Martinez*, 416 U.S. at 407).

B. This Court's decision in *Local No. 93* does not support the court of appeals' ruling that decree provisions may be enforced even if they are not proper remedies for federal-law violations. To begin with, the Court in *Local No. 93* decided only a narrow statutory issue. The Court ruled that entry of an affirmative action consent decree was outside the coverage of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), because that provision, which limits what measures an "order of the court" may "require" of employers, does not cover an employer's voluntarily adopted practices. *See* 478 U.S. at 513, 515, 517 n.8. Acknowledging that consent decrees generally have a dual order/contract character,[27] the Court held no more than that the contractual aspect was dominant for purposes of § 706(g). The Court did not extend that holding to any other setting.

Moreover, as its narrow § 706(g) holding makes clear, the Court in *Local No. 93* did not, as the court below supposed, establish a three-part test that, if satisfied, automatically permits all consent decrees to exceed the scope of permissible post-trial relief. Rather, in rejecting the claim that no consent decree may exceed a post-trial order, the Court concluded only that "a federal court is not *necessarily* barred from entering a consent decree *merely because* the decree provides broader relief than the

[27] "[I]n addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree." 478 U.S. at 525.

court could have awarded after a trial." 478 U.S. at 525 (emphasis added).[28] Thus, the three requirements set forth by the Court were, by their terms, only necessary—not sufficient—conditions for a consent decree's validity. Indeed, the Court explained that, even if a consent decree met the three necessary conditions, it might "otherwise [be] shown to be unlawful." 478 U.S. at 526.[29]

In any event, whatever *Local No. 93* decided for the situation before it, that decision plainly does not speak to the present context. *Local No. 93* involved only the *entry* of a consent decree; unlike the present case, it did not involve a *refusal to modify* a decree.[30] *Local No. 93* involved a defendant that enthusiastically embraced the decree; unlike the present case, it did not involve defendants who are affirmatively seeking modification (and hence the question of post-decree changes of law could not have arisen in *Local No. 93*). Finally, *Local No. 93* involved a city employer as defendant—which, in fact,

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[28] The general discussion in *Local No. 93* that was relied on by the court of appeals merely rejects the broad argument that § 706(g) should be construed to cover entry of a consent decree because of the "general principle that a consent decree cannot provide greater relief than a court could have decreed after a trial." 478 U.S. at 524.

[29] The Court did not consider other constraints on consent decrees in the Title VII context or in other contexts. It did not even consider whether the consent decree at issue violated the basic anti-discrimination prohibitions of Title VII or of the Fourteenth Amendment. *See* 478 U.S. at 517 n.8; *id.* at 530 (O'Connor, J., concurring).

[30] The Court in *Local No. 93* itself recognized that the standards governing entry of a decree were different from the standards governing modification. It noted that, while *entry* of a consent decree does not implicate § 706(g) of Title VII, a ruling on a motion to modify a consent decree does implicate § 706(g). 478 U.S. at 523 n.12. And the Court carefully distinguished from the entry case before it (478 U.S. at 526-28) two decisions that involved motions to modify—*System Federation No. 91, Ry. Employes' Dep't v. Wright, supra*, and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

the Court treated as if it were a private employer;[31] unlike the present case, it did not involve objecting state officials as defendants, and therefore it implicated none of the special constitutional concerns at issue here. The court of appeals ignored those critical distinctions in blindly relying on *Local No. 93* as authority for the district court's refusal to modify the consent decree without any serious inquiry into whether the contested provisions are proper current federal-law remedies.

II. The Court Of Appeals Erroneously Concluded That The Challenged Consent Decree Provisions Were Legitimate Federal Law Remedies.

The court of appeals also held, as an alternative ground for its decision, that every one of the challenged provisions of the consent decree was sufficiently based in federal law. Pet. App. 12a-13a & nn.9, 10. For that reason, the court concluded, continued enforcement of the entire decree did not run afoul of *Pennhurst's* prohibition on federal court enforcement of state law against state officials. Pet. App. 14a. Both the court's analysis and its conclusion are in error.

A. To begin with, as this Court's decisions in *System Federation*, *supra*, *Pasadena Bd. of Educ. v. Spangler*, *supra*, and other cases establish, a federal court may not treat a decree, once entered, as perpetual. Rather, the court is required to examine the changes in law that have taken place since entry of the consent decree and to determine whether those changes have undermined the bases for the challenged provisions. But the court below neither adverted to the change-of-law doctrine nor undertook any such examination. That failure is wholly inexplicable, because the parties entered into the consent decree on certain assumptions about the applicable law that have since proven false. Notably, while the parties agreed to

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[31] There was no reason to distinguish different kinds of defendants in *Local No. 93*, because the § 706(g) question is the same regardless of the nature of the employer. Notably, the Court in *Local No. 93* did not cite a single decision involving a consent decree binding a state defendant.

the decree on the assumption that some provisions could rest on state law,[32] this Court later decided in *Pennhurst* that federal courts may not enforce state-law obligations against state officials. This Court's decision in *Rhodes v. Chapman*, *supra*, also post-dates the July 1980 decree; and that decision, both in its rejection of a single-celling requirement and in its general clarification (and limiting) of Eighth Amendment requirements for prison conditions, has widely been recognized to have been, as Judge Starr said for the D.C. Circuit, "a ground-breaking decision." *Inmates of Occoquan v. Barry*, 844 F.2d at 835. *See Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984); *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (en banc) (directing modification of single-celling requirement after *Rhodes*).[33] The court below completely ignored those changes.

Second, the court of appeals relied primarily on the conclusion, unsupported by analysis of each particular challenged provision, that all of the provisions were justified as remedies for the alleged "totality of conditions" violation. Pet. App. 12a-13a. This notion is utterly insupportable. There was not, and could not have been, any unconstitutional "totality of conditions" at three of the four prisons to which the decree applies—the three that opened after the decree was entered. In any event, as the Fifth Circuit explained in *Ruiz v. Estelle*, 679 F.2d at 1140 n.98, 1153, "a generalized and 'vague conclusion' concerning the totality of conditions is insufficient": "The 'totality of the circumstances' test does not authorize [a federal court] to reform all deficient prison conditions.

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[32] The inmate activity section expressly proclaims its foundation in state law alone. Pet. App. 142a. And the classification section of the complaint states that the alleged deficiencies in classification are state-law deficiencies. *Id.* at 201a.

[33] Also post-dating the July 1980 decree was the Tenth Circuit's own leading decision on prison conditions, *Ramos v. Lamm*, *supra*, which greatly limited available Eighth Amendment relief and reversed provisions of a district court decree similar to many of those challenged here.

The remedy must be confined to the elimination of those conditions that together violate the Constitution." Otherwise, under the Tenth Circuit's approach, *any* condition, presumably at any prison, could be included in a federal court order once the totality of conditions concerning the "essential human needs" addressed by the Eighth Amendment was found wanting at one prison—and that would be so even if, as here, all of the Eighth Amendment requirements of food, clothing, shelter, sanitation, medical care, and safety have already been addressed.[34]

Third, the court made no serious attempt to tie each of the challenged decree provisions to federal law but rested instead on summary assertions in a single footnote. Pet. App. 13a n.10. That offhand approach is wholly inadequate to ensure the presence of the essential predicate, under *Ex Parte Young*, *supra*, for permitting a federal court injunction against state officials—that such an injunction is truly "necessary to permit the federal courts to vindicate federal rights" (*Pennhurst*, 465 U.S. at 105). Nor can it ensure that each provision of the decree complies with the important separation of powers and federalism constraints on federal court injunctions against state prison officials. *See* pp. 15-16, *supra*. In fact, the court of appeals merely cited four decisions, which either do not speak to the types of measures at issue here or, to the extent they do, actually hold that such measures are not constitutionally required.[35]

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[34] In *Hutto v. Finney*, *supra*, which was relied on by the court below, this Court upheld a 30-day limit on punitive placement in isolation cells where the cruel and unusual conditions of the isolationtion cells themselves (food, sanitation, space) had not been cured. 437 U.S. at 687. The measure upheld was thus directly related to the totality of conditions that are of Eighth Amendment concern. In that regard, the Court indicated that the time limit could be removed if the deficiencies in provision for basic inmate needs were corrected. *Id.* at 687 n.9.

[35] Thus, *Pell v. Procunier*, *supra*, upheld more restrictive visitation policies than those at issue here. *Rhodes v. Chapman*, *supra*, rejected a single-celling requirement and, stressing deference to prison officials' discretion, held that the Eighth Amendment addressed only the "basic human needs" of food, clothing, shelter,

B. There is, of course, considerable case law addressing the constitutional basis for the contested provisions in this case. That law, simply ignored by the Tenth Circuit, demonstrates that the challenged provisions of the consent decree have no solid foundation in federal law. Especially in light of the unchallenged provisions governing every aspect of prison conditions covered by the Eighth Amendment, the substantial intrusions on state prison administration are unjustified.

Thus, the Constitution does not speak to prisoners' proper security classifications; much less does it require use of a "least restrictive alternative" principle, bar use of specified substantive security criteria, forbid use of maximum security except for prisoners who have personally committed or are personally threatened by violence, or set limits on the permissible time of maximum security classification. Pet. App. 132a-135a, 164a-172a. (Indeed, respondent's complaint expressly referred to state law as the source of its claims concerning classification practices. *Id.* at 201a.) To the contrary, this Court has stressed that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes v. Chapman*, 452 U.S. at 349 n.14; *see Whitley v. Albers*, 475 U.S. at 321-22.[36] And where, as here, there

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medical care, sanitation, and safety. *Ramos v. Lamm*, *supra*, rejected a claim—based on a record showing grossly inadequate conditions in a prison that recently incurred a major riot—that classification, idleness, and inmate motility were properly included in an Eighth Amendment remedy. And *Ruiz v. Estelle*, *supra*, overturned single-celling and 60 square foot space requirements and examined each provision of the remedy to determine which portions were truly necessary.

[36] No decision of this Court supports, and the courts of appeals uniformly have rejected, classification standards like those challenged here. *See Walker v. Mintzes*, 771 F.2d 920, 933-34 (6th Cir. 1985); *Jones v. Mabry*, 723 F.2d 590, 594 (8th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); *Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1255-56 (9th Cir. 1982); *Gibson v. Lynch*, 652 F.2d 348, 352 (3d Cir. 1981), *cert. denied*, 462 U.S. 1137 (1983); *Young v. Wainwright*, 449 F.2d

is no enforceable entitlement to particular classifications in state law, prisoners have no due process procedural rights, let alone the formal procedural rights at issue here. *See Hewitt v. Helms*, 459 U.S. 460, 468 (1983); *Levoy v. Mills*, 788 F.2d 1437, 1440 (10th Cir. 1986).

Similarly, the Eighth Amendment not only leaves prison officials broad discretion to decide what conduct warrants inmate discipline (*see Rhodes v. Chapman*, 452 U.S. at 349 n.14; *Leonard v. Norris*, 797 F.2d 683, 685 (8th Cir. 1986); *Rivera v. Toft*, 477 F.2d 534, 536 (10th Cir. 1973)), but does not prescribe the duration of penalties like punitive segregation, as long as basic rights to food, sanitation, health, and safety are protected.[37] Moreover, given the unchallenged provisions (Pet. App. 187a-190a) that fully meet all due process requirements of *Wolff v. McDonnell*, 418 U.S. at 564-66, there is no constitutional basis for the decree's additional procedural requirements for inmate discipline (Pet. App. 190a-195a).

The costly inmate activity requirements (Pet. App. 142a-145a) likewise have no basis in federal law, as the decree itself attests. Those provisions are expressly based on state law. *Id.* at 142a.[38] And this Court in *Rhodes v. Chapman*, 452 U.S. at 348, made clear that deprivation of desirable programs, such as educational and vocational

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338, 339 (5th Cir. 1971). *See also Ramos v. Lamm*, 639 F.2d at 566-67 (reversing classification requirements).

[37] *See Hutto v. Finney*, 437 U.S. at 685-86 (1978); *Jackson v. Meachum*, 699 F.2d at 583; *Sostre v. McGinnis*, 442 F.2d 178, 192-93 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Isolation lasting much longer than the 30 days allowed here (Pet. App. 174a-182a) has been upheld. *See, e.g., Ross v. Reed*, 719 F.2d 689, 697 (4th Cir. 1983) (3 months); *Fitzgerald v. Procunier*, 393 F. Supp. 335, 342 (N.D. Cal. 1975) (9 months). In the present case, of course, inmates' rights to food, sanitation, etc., are fully protected by decree provisions that are not challenged.

[38] The Inmate Activity Section of the Decree begins: "One part of the [state] statutory mandate to the Department of Corrections and Criminal Rehabilitation is to 'try to rehabilitate' offenders committed to its custody and care. This statutory mandate will be implemented through the following policies and procedures:." Pet. App. 142a.

programs, "do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments" and so cannot be "cruel and unusual" punishments violative of the Eighth Amendment. *See also Battle v. Anderson*, 788 F.2d 1421, 1426-27 (10th Cir. 1986); *Ramos v. Lamm*, 639 F.2d at 566-67.

The flat ban on double celling (Pet. App. 136a)—which is not challenged with respect to the original PNM facility or facilities used for disciplinary segregation, maximum security, or specialized mental-health care—is equally unjustified in federal law. *Rhodes v. Chapman*, 452 U.S. at 348, held that there is no constitutional ban on double celling as long as the conditions of the cells are constitutionally adequate, as they are guaranteed to be here by unchallenged provisions of the decree.[39] Indeed, the only cells at issue all were built in recent years and contain between 80 and 121 square feet of living space, which is roughly 30-90% more than the 63 square feet that the Court approved for double celling in *Rhodes v. Chapman*.[40]

Finally, the visitation policies prescribed by the decree (Pet. App. 104a-131a) constrain prison officials' discretion more tightly than required by federal law. *See Pell v. Procunier*, *supra* (upholding more restrictive visitation policies and requiring only that visitation policies not be inconsistent with legitimate penological objectives, including security); *Turner v. Safley*, *supra* ("reasonably related" standard). For example, there is no sound justification for requiring that petitioners allow visits by ex-felons or persons also visiting other inmates, or for applying a "clear and convincing evidence" standard for

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[39] *See Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 1001 (3d Cir.), *reh'g denied*, 718 F.2d 1247 (1983), *cert. denied*, 465 U.S. 1102 (1984); *Smith v. Fairman*, 690 F.2d 122, 125-26 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); *Ruiz v. Estelle*, 679 F.2d at 1146; *Nelson v. Collins*, 659 F.2d at 428.

[40] The 60 square foot per prisoner requirements (Pet. App. 136a, 137a) are for the same reason without constitutional foundation.

denying visitation rights. Pet. App. 104a, 105a. Nor is there a constitutional right to "contact visits" (*id.* at 112a). *See, e.g., Block v. Rutherford*, 468 U.S. 576 (1984); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). And the challenged rules limiting searches (Pet. App. 112a-113a) are unduly restrictive under *Bell v. Wolfish*, 441 U.S. 520 (1979). *See, e.g., Goff v. Nix*, 803 F.2d 358, 369 (8th Cir. 1986), *reh'g denied*, 809 F.2d 530 (8th Cir.), *cert. denied*, 484 U.S. 835 (1987); *Campbell v. Miller*, 787 F.2d 217, 228 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Arruda v. Fair*, 710 F.2d 886, 888 (1st Cir.), *cert. denied*, 464 U.S. 999 (1983).[41]

III. The Standards For Modification Of Consent Decrees Binding State Officials Have Divided The Courts Of Appeals And Present Important Questions Requiring This Court's Review.

Review is also warranted in this case because the present court of appeals decision is inconsistent with decisions of other courts of appeals. On the proper interpretation of this Court's decision in *Local No. 93*, there is a square conflict. The Second Circuit has agreed with the court below that *Local No. 93* establishes sufficient conditions, not requiring substantial inquiry into the federal-law basis for contested decree provisions, for refusing to modify a consent decree against state officials. *Kozlowski v. Coughlin*, 871 F.2d 241 (1989), *quoted at* Pet. App. 15a. The Fifth Circuit, by contrast, has squarely rejected that view, holding that *Local No. 93* does not apply to a motion to modify a consent decree against state officials. *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252, *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987).

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[41] The decree provision that purports to forbid any decree modification that would lessen benefits to prisoners (*see* note 12, *supra*)—if, as it would seem, it is more than purely procedural—cannot be supported in federal law. One set of state officeholders may not limit the rights to modification that their successors would otherwise have under generally applicable legal principles.

Moreover, the courts of appeals have taken fundamentally inconsistent approaches to—and reached fundamentally inconsistent results concerning—the modification of consent decrees against state officials in cases quite similar to the present one. For example, the Fifth Circuit in *Lelsz v. Kavanagh*, *supra*, vacated several provisions of a consent decree against state officials, undertaking precisely the sort of careful examination of the federal law basis for each particular contested decree provision that the Tenth Circuit in this case failed to conduct. The court explained that the Eleventh Amendment and "the principles of federalism and comity which animate the Eleventh Amendment" demonstrate that "the only legitimate basis for federal court intervention . . . is the vindication of federal rights." 807 F.2d at 1252. It followed the directive of *System Federation* that "a consent decree must be modified to adjust to changes in governing law." 807 F.2d at 1254. And it concluded that the provisions were not closely enough tied to federal rights, even though, as the court recognized, the provisions at issue might have been included as prophylactic protections of federal rights. *See* 807 F.2d at 1248 & n.6; *see also id.* at 1256 (Wisdom, J., dissenting); 815 F.2d 1034 (dissent from denial of rehearing en banc).

The Ninth Circuit took the same careful approach in *Washington v. Penwell*, 700 F.2d 570 (1983), vacating certain provisions of a consent decree concerning legal services for inmates on the ground that "defendants [had] agreed to do more than constitutionally required" (*id.* at 574). The court explained: "The district court could not have entered an involuntary decree requiring state officials to do more than the minimum needed to conform with federal law. . . . Similarly, the district court's authority to adopt a consent decree comes only from the law the decree is intended to enforce." *Ibid.* (citations omitted). Consequently, the court said, "[t]he draconian standards applicable to requests for modification of consent decrees against private parties

. . . cannot apply here or the court would run afoul of the state's sovereign immunity." *Ibid.* (citations omitted). *See also Nelson v. Collins, supra* (4th Cir.) (following *System Federation*, court required modification of both contested and consent decrees in prison case, based on intervening change of law in *Rhodes* and on new factual circumstances that State had new prisons); *Ruiz v. Estelle, supra* (5th Cir) (rejecting crude "totality of circumstances" approach to justifying remedies addressed to any prison-condition measure, and reversing double-celling requirement).

This Court should establish uniform principles recognizing necessary limits on federal courts' authority to maintain control over state institutions through consent decrees.

CONCLUSION

The petition for a writ of certiorari should be granted.

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